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In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

By STUART STITES,
A. A. McLAUGHLIN,
ALEX KOPLIN,
LAWRENCE McCLANATHAN,
Counsel for Petitioner.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1924

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NOTICE

To E. H. Pringle, as Trustee in Bankruptcy of the Estate of Charles F. Boyd, Inc., Bankrupt, or Mitchell and Horlbeck, and Whaley, Barnwell & Grimball, his Attorneys of Record:

This is to notify you that the petitioner will, on the 5th day of January, 1925, or as soon thereafter as counsel may be heard, present to the Supreme Court of the United States, in its court room at Washington, D. C., his motion for a writ of certiorari upon his verified petition and a copy of the entire record in this cause; and a copy of said motion, said petition and brief accompanying

same are herewith delivered to you this 5th day of December, 1924.

JAMES C. DAVIS,
Director General and Agent,
By SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

ACCEPTANCE OF SERVICE

The foregoing notice, and delivery of copy thereof and of motion and petition for writ of certiorari and brief are hereby acknowledged this 5th day of December, 1924.

WHALEY, BARNWELL & GRIMBALL,
MITCHELL AND HORLBECK,
Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Now comes James C. Davis, Director General and Agent, petitioner, by his counsel, and moves this Honorable Court that it will by certiorari, or other process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said United States Circuit Court of Appeals for the Fourth Circuit lately pending, wherein the petitioner, James C. Davis, Director General and Agent, was appellant and E. H. Pringle, as Trustee in Bankruptcy of the estate of Charles F. Boyd Company, Inc., Bankrupt, was appellee; and to that end the petitioner now tenders here-

with his petition and brief with a certified copy of the entire record in said cause in said United States Circuit Court of Appeals for the Fourth Circuit.

SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of James C. Davis, Director General and Agent, hereinafter called petitioner, respectfully shows to this Honorable Court:

1. On January 15, 1924, Honorable H. A. M. Smith, United States District Judge for the Eastern District of South Carolina, in bankruptcy, affirmed the report of Lionel K. Legge, Esq., Special Referee in the matter of Charles F. Boyd, Inc., bankrupt, denying priority to a claim filed in the bankruptcy proceedings by petitioner.

The claim filed by petitioner for $2,213.70, duly itemized, covered freight, storage, and demurrage earned and accruing on and between April 19, 1918, and June 10, 1918; and on and between April 29, 1918, and August 27, 1918, on shipments to Charles F. Boyd & Company, Charleston, S. C.

These claims accrued in the operation during the period of Federal control of railroads by the Director General of Railroads of the properties of the Atlantic Coast Line Railroad.

No question was raised as to the amount due by the bankrupt to petitioner. The sole question raised on the record was whether the claims of petitioner were entitled to priority in the distribution of the assets of the bankrupt under the provisions of Sections 3466 and 3467 of the Revised Statutes of the United States and Section 64 (*b*) 5 of the Bankruptcy Act of 1898 (30 Stat. 544). In the opinion confirming the Referee's order the District Court said:

> The sole question is whether the claims preferred by the petitioner, James C. Davis, Federal Agent, are entitled to priority over all other claims under the provisions of Section 3466 of the Revised Statutes. In the opinion of the Court the provisions of Section 3466 do not apply to the claims of the petitioner. That Statute contemplates debts to the United States accruing to it directly under any statutory or contractual directions. The present claims do not fall into those categories. They are claims arising

only incidentally to the temporary operation by the Government of the plant of a transportation corporation, operated by the Government in like manner as it would have been operated by the corporation itself had the Government not taken possession. The very description of the claims shows this. They are all for freight, storage, and demurrage charges on merchandise transported as shipped by private parties. The Government in possession of the Railway plant of a corporation undertook the commercial transportation of articles shipped by private persons in like manner as the same were transported by the corporation when in possession of the Railway plant and lines. For all these charges the Government Agent has a lien upon the articles transported. It was the duty of that Agent to have collected all these charges before delivery of the articles to the consignees. Having seen fit to waive that lien and deliver the articles to the consignee without collecting the charges for which he had a lien, the Agent of the Government under the circumstances of this case is not entitled to a prior lien upon the general estate of the bankrupt consignee.

2. An appeal was taken from the order of the District Court to the United States Circuit Court of Appeals for the Fourth Circuit. Upon this appeal on June 12, 1924, a hearing was had in the United States Circuit Court of Appeals for the Fourth Circuit, and on September 29, 1924, the court rendered an opinion affirming the decision

of the District Court. A copy of this decision is hereto attached as Exhibit "A."

3. The Circuit Court of Appeals for the Fourth Circuit in affirming the judgment of the lower court held, under the decision of this Court in the case of *Du Pont* v. *Davis,* 264 U. S. 456, that debts due to petitioner were debts due to the United States, but held that the United States was not entitled to priority in the distribution of assets of a bankrupt estate except for taxes, and therefore affirmed the decision of the District Court.

4. The opinion of the Circuit Court of Appeals states that its conclusion is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit *In re Tidewater Coal Exchange,* 280 Fed. 648, and of the Circuit Court of Appeals for the Eighth Circuit *In re Western Implement Company,* 171 Fed. 81.

5. Petitioner respectfully submits that the Circuit Court of Appeals for the Fourth Circuit in affirming the judgment of the District Court for the Eastern District of South Carolina erred as a matter of law in holding,

(*a*) that the United States was not a " person " within the meaning of Section 64 (b) 5 of the Bankruptcy Act of 1898, and

(*b*) that the United States was not entitled to priority in bankruptcy except for taxes.

6. That the judgment of the Circuit Court of Appeals in this case is a final judgment.

7. The judgment of the Circuit Court of Appeals for the Fourth Circuit being one arising in bankruptcy is final and is reviewable by this Court only by certiorari under the provisions of the Act of September 6, 1916 (C. 448, 39 Stat. 726).

8. Certiorari should be granted in this case because the question involved is one of great public importance, since the effect of the decision is to deny to the United States priority in bankruptcy except for taxes.

9. The question involved is also one which calls for a decision by the Court in order to settle and harmonize the conflicting decisions of the Circuit Court of Appeals for the second, eighth, and fourth circuits.

Wherefore, upon due consideration of this petition, of the annexed brief, and a certified copy of the record of the United States Circuit Court of Appeals for the Fourth Circuit filed herewith, petitioner respectfully prays that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this court on a date to be designated a full and complete transcript of the record of all proceedings had in this cause to the end that the same may be reviewed and determined by this honorable court under said writ as provided by law. And petitioner prays that upon the final consideration of this cause and of said writ, the said judgment of the United States Circuit Court of Ap-

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peals for the Fourth Circuit will be reversed by this honorable court and judgment rendered in favor of the petitioner.

Petitioner further prays for such other equitable and general relief as may appertain to this case and as may be competent for this honorable court to grant.

SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

DISTRICT OF COLUMBIA,
City of Washington, to wit:

Before me, the undersigned notary public, personally appeared A. A. McLaughlin, who, being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioner herein; that he has read the foregoing application for a writ of certiorari; and that all the facts therein stated are true and correct to the best of his knowledge and belief.

A. A. MCLAUGHLIN.

Subscribed and sworn to before me this 3d day of December, 1924.

W. B. ROBINSON.
Notary Public, District of Columbia.
My Commission Expires March 23, 1925.

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (ATLANTIC COAST LINE RAILROAD), PETITIONER,

v.

E. H. PRINGLE, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES F. BOYD COMPANY, INC., BANKRUPT, RESPONDENT.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

I

THE COURT ERRED IN HOLDING THAT THE UNITED STATES WAS NOT ENTITLED TO PRIORITY EXCEPT FOR TAXES

The sole question involved in this case is whether the United States is entitled to priority in bankruptcy for debts other than taxes.

It is admitted that prior to the passage of the Bankruptcy Act of 1898 (30 Stat. 544), the United States was entitled to priority for all debts. (*Lewis, Trustee,* v. *U. S.,* 92 U. S. 618.)

The provisions of section 64 of the Bankruptcy Act of 1898, as amended, are as follows:

> *a.* The court shall order the trustee to pay all taxes legally due and owing by the

bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the position; (2) the filing fees paid by the creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the

> court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, * * * or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.
>
> *c.* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Petitioner contends that under the provisions of section 64 (*b*) 5, *supra*, the United States is entitled to priority for debts other than taxes, since a debt to the United States is one which "by the laws of * * * the United States is entitled to priority." Section 3466 of the Revised Statutes is as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is in-

> sufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law as to cases in which an act of bankruptcy is committed.

It is well to bear in mind the rule of construction uniformly followed by this Court that Acts granting priority being based on public policy are to be construed liberally.

In *United States* v. *State Bank of North Carolina*, 6 Peters 29, this Court said:

> The right of priority of payment of debts due to the Government is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow inter-

> pretation. Like all other statutes of this nature they ought to receive a fair and reasonable interpretation, according to the just import of their terms.

See also *U. S.* v. *Fisher,* 2 Cranch, 358.

The terms of the Acts involved are clear and we "must take the law as we find it." (*U. S.* v. *Gooding,* 12 Wheaton, 460–478.)

Section 64 (*b*) 5 contains the words "debts owing to any person who by laws of * * * the United States is entitled to priority," and section 3466 contains the words "debts due the United States." Petitioner, therefore, contends that Revised Statutes 3466 created the priority referred to in the above quoted provisions of section 64 (*b*) 5 of the Act of 1898.

To sustain the position taken by the Circuit Court of Appeals for the Fourth Circuit this court must hold either (*a*) that section 3466 was repealed by the passage of the Bankruptcy Act of 1898, or (*b*) that the United States is not a "person" within the meaning of section 64 (*b*) 5.

SECTION 3466, REVISED STATUTES, WAS NOT REPEALED BY THE PASSAGE OF THE BANKRUPTCY ACT OF 1898

It is elementary that a repeal will not be implied unless there is an irreconcilable conflict between the statutes (*Harford* v. *U. S.,* 8 Cranch 109; *North American Commercial Company* v. *U. S.,* 171 U. S. 110, 129), and that this court should so construe the statutes as to give effect to both, if possible.

In fact this court in the case of *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.,* 224 U. S. 152, held that section 3466 of the Revised Statues and the Bankruptcy Acts of 1867 and 1898 should be construed in *pari materia* and that the Act of 1898 superceded Revised Statutes 3466, only in so far as the two statutes were inconsistent.

That section 3466 Revised Statutes was not repealed by the Bankruptcy Act of 1898 is clearly indicated by the decisions of this court in *U. S.* v. *National Surety Co.,* 254 U. S. 73; *Sloan Shipyards* v. *U. S. Fleet Corporation,* 258 U. S. 549, and *U. S.* v. *Oklahoma,* 261 U. S. 253.

There is no inconsistency in holding as this court did in the *Guarantee case, supra,* that except as to taxes, debts due the United States were deferred until certain other claims such as labor had been paid, as that was clearly the intention of Congress in passing the Act of 1898.

THE UNITED STATES IS A "PERSON" WITHIN THE MEANING OF SECTION 64 (B) 5 OF THE BANKRUPTCY ACT

That the United States is a "person" within the meaning of section 64 (*b*) 5 was decided by the Circuit Court of Appeals for the Second Circuit in *In re Tidewater Coal Exchange,* 280 Fed. 648. See also *In re Western Implement Co.,* 170 Fed. 81.

The decision of the lower court in this case admits that the conclusion reached by it is in conflict with the decision of the Circuit Court of Appeals

for the Second Circuit in the case of *In re Tidewater Coal Exchange,* 280 Fed. 648, in which the same question was involved. In that case the court said:

> The Circuit Court of Appeals for the Seventh Circuit, in *In re E. H. Hibner Oil Co.,* 264 Fed. 667, A. L. R. 629, declared that unpaid freight charges for shipments by railroad during the period of federal control are the property of the United States, and the claim therefore is entitled to priority in bankruptcy under section 62(*b*) of the Bankruptcy Act (Comp. St. sec. 9648) and section 3466 of the Revised Statutes (Comp. St. Sec. 6372). The Bankruptcy Acts of 1800 (Act April 4, 1800, c. 19, sec. 62 (2 Stat. 36)), of 1841 (Act August 19, 1841, c. 9, sec. 5 (5 Stat. 444)), and of 1867 (Act March 2, 1867, c. 176, sec. 28 (14 Stat. 530)) expressly recognized the priority of debts due the United States, thus preserving in all its essential features the provision in the act of 1797, reproduced in section 3466 of the Revised Statutes relating to priorities. The Bankruptcy Act of 1898 contains no similar express provision; and, if, under that act, priority is given, it must be because of clause 5, subd. (*b*), Sec. 64 (Comp. St. Sec. 9648), which reads as follows:
>
> "(5) Debts owing to any person who by the laws of the states or the United States is entitled to priority."

> We have no doubt that the United States is to be regarded as a person within the meaning of the clause cited, and can assert its priority as given to it under section 3466 of the Revised Statutes (Comp. St. Sec. 6372), which is reproduced in the margin. The priority secured to the United States is priority over all creditors. The statutory provision referred to is simply declaratory of the common-law rule which entitles a sovereign to priority over other creditors of an insolvent. *United States* v. *National Surety Co.*, 254 U. S. 73, 75, 41 Sup. Ct. 29, 65 L. Ed. 143.

The attention of this court is directed to the fact that an application for certiorari in the last cited case was denied (*Davis* v. *Coyle,* 260 U. S. 721), and that on the application respondent suggested to this court that in view of the dissent in the case of *Sloan Shipyards* v. *U. S. Fleet Corporation,* 258 U. S. 549, the writ of certiorari should be granted.

Petitioner submits that the decision of the lower court in this case is not only in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the *Tidewater case, supra,* but is also in conflict with the decision of this court in the case of *U. S.* v. *National Surety Company,* 254 U. S. 73; *U. S.* v. *Oklahoma,* 261 U. S. 253, and with the decisions of the Circuit Courts of Appeals for the seventh and eighth circuits in the cases of *In re Hibner*

Oil Co., 264 Fed. 667, and *In re Western Implement Co.,* 170 Fed. 81, as well as with the decision of Judge Rose of the Circuit Court of Appeals for the Fourth Circuit in the case of *In re Atlantic G. & P. Steamship Co.,* 289 Fed. 146.

Petitioner also suggests that the decision in this case is in actual conflict with the decision of the lower Court in the case of *Lott* v. *Salisbury,* 237 Fed. 191, in which that Court said, page 203:

> The case most strongly relied upon is *Guarantee Title & Trust Co.* v. *Title Guarantee & Trust Co.,* 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. That case holds that the United States, except for taxes due, had not in the enactment of the bankruptcy law exercised its sovereign right of providing a preference for its own claims against the bankrupt. It is conceded that the government has such a right and frequently exercises it. In the case just referred to the Court held that the government had, except as to taxes, put itself in the plight of an ordinary unsecured creditor and under section 64b was postponed till certain claims, wages among others, were paid.

The attention of this court is directed to the fact that the Circuit Courts of Appeal for the First and Fifth Circuits have held that the Director General is entitled to priority in receivership proceedings. (*Davis* v. *Pullen,* 277 Fed. 650; *Davis* v. *Miller Link Lumber Co.,* 296 Fed. 649.)

Petitioner respectfully submits that this Court in the *Guarantee case, supra,* merely held that claims of the United States except for taxes were subordinated to labor claims by the Act of 1898, and that the dissent in the *Sloan case, supra,* can not be considered as controlling in this case.

If the position of the Circuit Court of Appeals for the Fourth Circuit in this case is correct then it was not necessary for the majority of this Court to base its decision in the *Sloan case, supra,* on the ground that a debt due the Fleet Corporation was not a debt due the United States; nor was it necessary for this Court to pass on the question involved in *U. S.* v. *National Surety Co.,* 254 U. S. 73, since a finding by the court that the United States was not entitled to priority except for taxes would have disposed of these cases.

It is respectfully submitted, therefore, that the Circuit Court of Appeals for the Fourth Circuit erred in its conclusion in the instant case and that this court should grant the petition for certiorari in order that the error may be corrected.

THE QUESTIONS INVOLVED ARE OF SUCH IMPORTANCE WRIT OF CERTIORARI SHOULD BE GRANTED

It is submitted that the writ herein should be granted since the question involved in this case is one of great public interest, of gravity and importance (*In re Lau Ow Bew,* 141 U. S. 583), and that the writ should be granted in order that the conflict in the decisions of the various courts may

be corrected. (*Forsythe* v. *Hammond,* 166 U. S. 514, and *The Three Friends,* 166 U. S. 49.)

Respectfully submitted.

SIMEON HYDE,
A. A. MCLAUGHLIN,
ALEX. KOPLIN,
LAMBERT MCALLISTER,
Counsel for Petitioner.

EXHIBIT A

United States Circuit Court of Appeals Fourth Circuit

JAMES C. DAVIS, FEDERAL AGENT FOR Claims Due in Operation of Atlantic Coast Line Railroad Company, Appellant *versus* E. H. PRINGLE AS TRUSTEE IN BANKRUPTCY of the Estate of Charles F. Boyd Company, Inc., Bankrupt, Appellee	No. 2245

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston. In Bankruptcy. (Argued June 12, 1924. Decided Sept. 29, 1924.)

Before Woods and Waddill, Circuit Judges, and Webb, District Judge.

Alex Koplin, general attorney for U. S. Railroad Administration (Simeon Hyde; Lambert McAllister and Rutledge, Hyde, Mann & Figg on brief) for Appellant, and N. B. Barnwell (F. H.

Horlbeck; Whaley, Barnwell & Grimball, and Mitchell & Horlbeck on brief) for Appellee.

WOODS, *Circuit Judge:*

Charles F. Boyd Company, Inc., was adjudged bankrupt on August 20, 1920. The Director General on February 3, 1921, filed claims amounting to $2,213.70 for freight, storage, and demurrage accruing to the Atlantic Coast Line Railroad Company during Federal control. Afterwards, on February 27, 1922, the Director General by petition claimed priority over general creditors in the distribution of the assets. No point seems to have been made before the referee or the District Court that the claim for priority was not properly set up.

If demurrage, freight, and storage charges in favor of the Director General are debts due to the United States, and as such are entitled to priority, the priority was inherent in the debts and required recognition by the court when called to its attention at any time before distribution of the assets.

The referee reported against the claims of priority and the district judge confirmed his report.

We are unable to agree with the referee and the district judge that the debts due to the Director General were not debts due to the United States of the character given priority by section 3466 of the Revised Statutes. The Supreme Court has decided otherwise. In *DuPont* v. *Davis,* April 7, 1924, the court says: "In taking over and operating the railroad systems of the country the United States did so in its sovereign

capacity, as a war measure, ' under a right in the nature of eminent domain.' *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554; *Northern Pacific R. R. Co.* v. *North Dakota,* 250 U. S. 135; *In re Tidewater Coal Exchange,* 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States, sec. 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity. *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123; *In re Tidewater Coal Exchange,* 280 Fed. 648." *Davis* v. *Corona Coal Co.,* decided by the Supreme Court May 26, 1924.

The question of priority of debts, other than taxes, owing to the United States in the distribution of bankrupt estates is one of difficulty. It is not to be decided on the general doctrine of priority of debts due the sovereign, for the Congress has undertaken to cover the whole subject by statutes. The act of 1797, R. S. 3466, provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having suffi-

cient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

By virtue of this statute the United States had a preference in the payment of its debts under any of the conditions mentioned in the statute—but not in a distribution which for any reason did not come within the statute. *United States* v. *Oklahoma,* 261 U. S. 253. In that case the State setting up a claim in behalf of the depositors of a bank under authority of a State statute was held to have priority over debts due the United States, on the express ground that the bank assets in the hands of a State commission did not present a condition under which the statute gave the United States priority.

The Bankruptcy Statute of 1867, R. S. 5101, provided the following order of priorities:

"In the order for a dividend, the following shall be entitled to priority, and the first paid in full in the following order:

"First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title and for the custody of property, as herein provided.

"Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

"Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

"Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

"Fifth. All debts due to any person, who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State."

Thus not only taxes but all debts due the United States were given priority over all other liabilities, except costs and expenses of bankruptcy proceedings. In other words the priority given all debts due to the United States by R. S. 3466 was sanctioned and reenacted by the Bankruptcy Statute of 1867. As the court said in *Lewis, Trustee* v. *United States,* 92 U. S. 618, the statute contained no qualifications of priority of the United States, and the court could not interpolate one.

What limitation, if any, in the distribution of bankrupt assets did the subsequent Bankruptcy Act of 1898 put upon the general priority given the United States under the previous statutes? The act of 1898 was intended to cover completely all matters of adjudication, administration, discharge, priorities and distribution of assets. The statute and rules made under it supplanted and annulled all previous inconsistent statutes and rules of the courts of common law and equity. *United States Fidelity & Guaranty Company* v. *Bray,* 225 U. S. 205, 217. "The act takes into

consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment." *Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152, 160.

The Statute provides the following order of priority:

(*a*) The court shall order the trustee to pay all taxes legaly due to the United States, State, county, district or municipality in advance of the payment of dividends to creditors.

(*b*) Debts to have priority, except as herein provided, and to be paid in full, * * * and the order of payment shall be: (4) wages due to workmen, clerks, traveling or city salesmen or servants, which have been earned within three months before the date of the commencement of the proceedings; and (5) debts owing to any person who by laws of the States or the United States is entitled to priority.

The Congress thus took from debts due the United States, other than taxes, the priority given such debts along with taxes by the act of 1867 by leaving out of the act of 1898 other debts in providing for priority of taxes. This seems too clear for discussion; and so the court decided in *Guaranty Company* v. *Title Guaranty Company, supra.* There it was held that the act of 1797, R. S. 3466, the Bankruptcy Statute of 1867, R. S. 5101, and the Bankruptcy Statute of 1898 must be considered in pari materia; and that in bankruptcy proceedings the act of 1898 superceded section 3466, R. S. so far as the two statutes were inconsistent.

It is argued, however, that priority is given the United States next in order to debts for wages, by section 64 *b* (5) "Debts owing to any person who by the laws of the States or the United States is entitled to priority." This grade of priority is not given to the United States by virtue of R. S. 3466 unless the United States falls under the designation of "any person." The Statute itself gives this definition: "(19) 'persons' shall incude corporations except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." Sec. 1, cl. (19), Bankruptcy Act of 1898.

The failure to include the United States and the States in the definition could not have been inadvertent. The United States and the several States of the Union are not persons and are not commonly thought of as persons, and if it had been intended that "persons" should have such a comprehensive and unusual meaning as to include them, the framers of the definition would have said so.

Again, when the Congress had already dealt with claims of the United States under the name of the United States and had deliberately limited its priority to taxes, it is hardly reasonable to attribute to the Congress an intention to deal again with the claims of the United States and include them in a provision relating to debts of "any person."

It will be noticed further that the language of (5) section 64 *b* of the act of 1898 is taken almost literally from the corresponding subdivision of the bankruptcy act of 1867, and in the absence of the expression of a contrary intention the language should be held to have the same meaning in the latter statute as in the former from which it was taken. In the act of 1867 " persons " in subdivision (5), R. S. 5101, could not have been intended to include the United States because all the debts due to the United States had been provided for and given priority over all other debts of any kind by subdivision (2) of the same section.

The record of the passage of the bankruptcy act of 1898 is significant. The bill as passed by the Senate contained the following priorities:

" Sec. 9. That the following debts shall have preference in the order named, over other debts in the distribution of the estate of the bankrupt, to wit:

"First. Debts due to servants or laborers employed by the bankrupt * * *.

"Second. Taxes or revenue due the United States.

"Third. Taxes due any State or Territory or the District of Columbia.

"Fourth. Taxes due any county. * * *."

"But none of such debts shall be recognized or paid unless duly proved and allowed as prescribed in reference to other debts and claims against the bankrupt."

All that followed the enacting clause of the Senate bill was struck out by the committee of the House, and the House bill with about eighty

amendments was substituted. The original House bill as introduced and referred to the committee contained the following as to priorities:

"Sec. 64. Debts which have priority: (*a*) Debts owing to the United States, a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate."

The committee changed this section to the form in which it was enacted in the act of 1898.

Thus it appears that after consideration of the question the Congress struck out a provision for priorities of all lien debts owing to the United States, the States and municipalities, and substituted for it a provision in the act of 1898 limiting the priority of the United States, the States, and municipalities to taxes.

As it seems to us, the analysis of the statutes and the record of the passage of the act of 1898 require the holding that the law-making power of the United States has limited its priority in bankruptcy to its claim for taxes.

This conclusion is opposed to the high authority of the Circuit Court of Appeals of the Second Circuit: *In re Tidewater Coal Exchange,* 280 Fed. 648, 650; and of the eighth circuit: *In re Western Implement Company,* 171 Fed. 81. In the view of these courts the United States and States are persons within the meaning of subdivision (5) of section 64 *b* of the Bankruptcy Act of 1898, and, therefore, entitled to priority under R. S. 3466 over general creditors after payment of wages. In the *Tidewater case* the court cited as authority for the holding *In re Hib-*

ner Oil Company, 264 Fed. 667. But the Circuit Court of Appeals of the Seventh Circuit in the latter case was called on to discuss and decide only the question whether a debt due to the Director General was a debt due to the United States: the court did not discuss the priority of a debt due to the United States, for in the opinion it is stated the priority of such a debt was conceded. Judge Rose in the District Court of Maryland expressed assent to these authorities *In re Atlantic, G. & P. S. S. Company,* 289 Fed. 146, but as the court held there was no debt to the United States the point was not really involved. The State of Minnesota was held to be "a person" within the meaning of section 64 *b* of the Bankruptcy Act of 1898 by Judge Purdy in the District Court for that State, *In re Western Implement Company,* 166 Fed. 578; and the judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit for the reasons stated by the district judge, 171 Fed. 81. The *United States* v. *National Surety Company,* 254 U. S. 73, does not decide the question. There the priority of debts due the United States over general creditors seems to have been conceded by the parties, for the court is careful to say that the sole question presented was one whether in the distribution of a bankrupt estate the United States had priority over a surety company claiming subrogation to the rights of the United States. *Marshall, Receiver,* v. *The People,* 254 U. S. 380; *United States* v. *Oklahoma,* 261 U. S. 253; *Davis, Director General,* v. *Pullen* (First Circuit), 227 Fed. 650, and *Davis, Director General* v. *Miller-Link Lumber Company,* (Fifth Circuit), 296 Fed. 649,

are not authorities for either side, for the question of the right to priority arose in receivership proceedings, and, therefore, did not involve the meaning of the provisions of section 64 of the Bankruptcy Act of 1898 fixing priority.

We find no binding authority opposed to the conclusion that the United States has no priority in bankruptcy except for taxes. On the contrary we venture to think it is supported by the reasoning and conclusion of the court in *Guarantee Company* v. *Title Guaranty Company,* 224 U. S. 152. In *Sloan Shipyards* v. *United States Fleet Corporation,* 258 U. S. 549, the majority of the court denied priority in a bankruptcy proceeding set up by the Emergency Fleet Corporation on the ground that even if the United States would be entitled to priority, the Emergency Fleet Corporation was a separate entity and its claim for priority could not be sustained. The majority intimated no opinion on the question whether a debt to the United States other than for taxes would have been entitled to priority. The Chief Justice and Justices Van Devanter and Clark dissented from the reasoning of the majority, but as to the claim to priority concurred in the result in this language used by the Chief Justice: "As to the preference claimed against a bankrupt in No. 526 by the Fleet Corporation, I concur in the conclusion of the court that it cannot be allowed under the statute as to preferences in bankruptcy, because I do not think it extends to claims of the United States except those for taxes."

For the reasons stated, and on the authority of *Guarantee Company* v. *Title Guaranty Company,*

supra, and the views expressed by the Chief Justice and Justices Van Devanter and Clark above quoted, we hold that in bankruptcy, debts due to the United States other than for taxes have no priority over general creditors.

No sound principle of public policy can be invoked in support of preference to the Federal Government and to the States over citizens in the collection of ordinary debts. On the contrary, the contractual operations of the Federal Government and of the States have become so extensive and so involved with the business of private citizens that priority to the Federal Government and to the States except for taxes would operate as an oppressive hardship on other creditors of bankrupts.

(Affirmed.)

True copy.

Teste:

[SEAL.] CLAUDE M. DEAN, *Clerk*
U. S. Circuit Court of Appeals, 4th Ct.

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Deputy Clerk.

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